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No. 139

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1954

W. J. EARHART,

Petitioner

vs.

ALFRED J. CALLAN, JR., Trustee in Bankruptcy of the Estate of Felix Ivan Pugh, Bankrupt,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR NINTH CIRCUIT

JOHN EGAN BELCHER
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Seattle, Washington

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Seattle 1, Washington

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR NINTH CIRCUIT

W. J. EARHART prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on March 10, 1955.

CITATIONS TO OPINIONS BELOW

The order of the referee in bankruptcy (R.14-15) is printed in Appendix B hereto, *infra* p. 3a. The order of the District Court (R. 65-67) printed in Appendix B hereto, *infra* p. 8a is unreported. The opinion of the Court of Appeals for the Ninth Circuit printed in Appendix B hereto *infra* p. 10a (Not yet reported).

The petition for re-hearing is printed in Appendix B hereto, *infra* p. 10a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1) and 11 U.S.C. Sec. 67.

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 10, 1955; p. 10a *infra.*

Rehearing was denied on April 14, 1955 (Clerk's certificate).

QUESTION PRESENTED

Whether 54 tons of baled alfalfa hay in the hay barn on premises leased to the bankrupt by petitioner, under *bailment with the privilege of purchase* forms any part of the bankrupt estate.

STATUTES INVOLVED

The statutory provisions involved are Order in Bankruptcy XXVII, set out in §53, Title 11, U.S.C., Secs. 66 and 67 of the (Bankruptcy Act 30 Stat. 555, 66 Stat. 424) 11 U.S.C. Sec. 66 and 67. They are printed in Appendix A, *infra* p. 1a.

STATEMENT

This litigation concerns 54 tons of baled alfalfa hay which the referee in bankruptcy, in a summary proceeding held was part of the assets of the bankrupt estate of Felix Ivan Pugh, although not listed in the schedules filed by the bankrupt. The district court confirmed the referee's findings and the Court of Appeals, without discussion of errors claimed and without indicating the ground or grounds therefor affirmed. The undisputed facts as disclosed by the record are:

Anna Earhart is the owner of a small farm near Kent, Washington which she leased June 1, 1952 for five years at a monthly rental of $125 to Felix Ivan Pugh. (R. 38).

W. J. Earhart, her brother, was the owner of 21 head of milk cows, on this farm which he sold to Pugh when the farm property was leased, taking a chattel

mortgage for the purchase price which was to be paid at the rate of $100 per month.

W. J. Earhart had financed Pugh in the purchase of hay to feed the milch cows during the winter of 1952-53 (R. 39) because he (Earhart) had a chattel mortgage on the cows and was interested in keeping them in good condition.

In July of 1953 Pugh having become two months delinquent for rent of the farm and also some five months delinquent in his payments on the chattel mortgage, re-financed through the Farmer's Home Loan Administration at Auburn, Washington (R. 39) and obtained Earhart's interest in the milch cows. From proceeds of a loan from Farmer's Home Loan Administration Pugh paid Earhart the full balance due him on the chattel mortgage. (R. 39) Pugh did not pay what he then owed in rent nor the balance he owed Earhart for the 1952-53 hay (R. 39). Pugh gave Earhart his promissory note dated July 10, 1953 to satisfy these obligations in the amount of $714.00 (R. 39) later listing Earhart as a general creditor in his schedules in bankruptcy.

Pugh on July 10, 1953 asked Earhart to again finance the purchase of hay to feed Pugh's milch cows during the winter of 1953-4. (R. 39-40).

Earhart told Pugh he would do so but on an *entirely different basis* than the previous year (R. 40) because Earhart had no further interest in the milch cows and Pugh had not fully paid him for the 1952-53 hay and he wanted to be careful (R. 50) when he found out about Pugh's NSF checks (R. 51).

Earhart agreed to buy the hay, store it in the hay barn on the farm and further agreed that he would sell the hay to Pugh as and when it was fed by him to the cows and to be paid for as fed, such payment to be determined and paid each month (R. 58) (R. 40, 51). The feeding season was not expected to commence until late in October 1953 (R. 44). The hay had not yet been sold to Pugh by Earhart as the former did not need it for feed at that time and there was no agreement as to price or amount to be fed each month (R. 44) when Pugh filed his petition in bankruptcy.

In August 1953, without the knowledge of Earhart, Pugh went to Sunnyside, Washington where he met a man named Walters and undertook to buy 60 tons of baled alfalfa hay. (R. 40). He did not get a bill of sale from Walters, but merely a receipt for his check (R. 28). Pugh, well knowing he did not have funds sufficient on deposit in a bank at Enumclaw, Washington to meet his check when presented for payment gave Walters his check in the amount of

$1200 which check was dishonored (R. 28). The bank returned Pugh's check to Walters marked NSF. (R. 28).

On his return from Sunnyside to Kent, Pugh advised Earhart he had bought 60 tons of baled alfalfa hay and wanted Earhart to give him the money to cover this NSF check which Earhart refused to do. (R. 39-40).

Earhart told Pugh he should not have bought the hay (R. 40). Earhart told Pugh he would buy the hay and sell it to Pugh on a monthly basis as and when Pugh fed it to the cows (R. 40) late in the fall.

Earhart thereupon and on August 22, 1953 wrote the bank on which Pugh wrote his $1200 check and sent his own check drawn on a bank at Kent, Washington in the amount of $1200 (Ex. 3, R. 42) stating to the bank that he did not intend to cover Pugh's check, stating:

> "I do not intend to handle it in that way. I will buy the hay and store it at the farm and will sell it to Ivan as he uses it by the month. Here is my check for $1200. Will you please handle it so that I will be the owner of the hay and I will pay you for the trouble you are put to."

The bank returned Earhart's check in a letter dated August 24, 1953 (Ex. 4, R. 42) which reads:

"Enclosed herewith your check in the amount of

> $1200 which we are returning. We suggest that you make direct payment to the people from whom you purchase the alfalfa hay and get a bill of sale. We have no way of protecting your interest in this matter and consequently we have handled it this way."

Earhart thereupon and on August 27, 1953 made his check (Ex. 5 R. 43) payable to Harry S. Walters in the amount of $1200; sent it to Walters at Sunnyside stating that he (Earhart) was buying the hay and not replacing Pugh's NSF check (R. 44). In addition Earhart paid for the hauling of the hay by truck from Sunnyside to Kent where it was placed in the hay barn on the farm (Ex. 6 R. 46) — (cancelled checks of Earhart to Strothers listed at page 64 of the record).

The hay was purchased and paid for by Earhart at his sole expense the hay was hauled by truck from Sunnyside to the farm property at Kent, Washington where it was stored in the hay barn. Pugh paid nothing to Earhart on account of said transaction. The hay was delivered to the farm in four truck loads of 13 tons each (R. 45). The first load was delivered at the farm September 8, 1953 (R. 52) and the last load was delivered to the farm at Kent and placed in the hay barn September 29, 1953 (R. 52). The parties had not arrived at any definite agreement as to the amount of hay to be fed each month or the amount to

be paid therefor and none of the hay had been fed to the cattle because Pugh was then feeding local hay. On October 14, 1953 (R. 21) Felix Ivan Pugh filed a voluntary petition in bankruptcy and was adjudged bankrupt. At that time the bankrupt had on hand some thirteen odd tons of local hay he had been feeding (R. 21) which was enough to feed these 21 head of cattle for another month — until November 1953 which to the date of hearing, December 1, 1953 (R. 20) had not yet been eaten up (R. 21).

In his schedule of assets the *bankrupt did not list the 54 tons of baled alfalfa hay as an asset*, and his schedules have never since been amended.

On October 16, 1953 the bankrupt delivered to the petitioner, Earhart, after consultation with his lawyer (Neal Clark) (R. 48) a statement in writing which reads:

> "I wish it to be known that the 54 tons of alfalfa hay in the barn at 611 West Taylor Road was bought and paid for by W. J. Earhart and is fully his property and I have no claim against it."
>
> (Signed) IVAN PUGH (Ex. 1 R. 33)

And to the Farmer's Home Loan Administration under date of October 21, 1953 with whom he had previously refinanced the cattle he delivered the following written statement:

"This is to certify that approximately 60 tons of baled hay which is in the barn was purchased by W. J. Earhart of 6723 South 124th Street, Seattle, Washington and was brought out to the farm by Mr. Earhart."

(Signed) F. I. PUGH (Ex. 2, R. 34)

A trustee, in the person of Alfred J. Callan Jr. was elected Trustee November 17, 1953.

The bankrupt listed no assets other than household furniture exempt to him and his family.

It appearing to the trustee that the barn on the farm contained 54 tons of baled alfalfa hay together with some 13 odd tons of local hay, the trustee petitioned the referee for an order directed to the bankrupt and the petitioner herein, W. J. Earhart, to show cause why it should not be determined that the Trustee has full and complete title to said 54 tons of hay (R. 5-7).

An order to show cause was entered by the referee and served on Earhart returnable December 1, 1953 (R. 8-10).

Earhart filed his return thereto setting forth, among other things, that he purchased and paid for this hay from Walters at Sunnyside and personally paid for the hauling thereof at a total cost to him of $1532.49 (R. 10-13) and that he (Earhart) was the owner thereof, that Pugh had no interest therein and

that said hay formed no part of the assets of the bankrupt estate (R. 10-13).

At a summary hearing before the referee on oral testimony and documentary evidence the referee ruled that it was a matter of possession (R. 22) without consideration of all of the facts as to how possession was obtained by the bankrupt or any other circumstance (R. 22). Findings of fact and conclusions of law and an order were entered by the referee declaring that there was a novation and that title to the hay be vested in the trustee free and clear of any claim on the part of W. J. Earhart (R. 14-15).

On January 14, 1954 W. J. Earhart filed his petition for review in the District Court (R. 18-20), to which the referee made his return with a transcript of the evidence and all of the exhibits.

The District Court, on March 8, 1954, without further testimony and without making independent findings, adjudged and decreed that the order entered by the referee be in all respects ratified, approved and confirmed. (R. 65-67).

Earhart appealed to the Court of Appeals for the Ninth Circuit (R. 67) alleging error in the findings and claiming ownership under a bailment with the privilege of purchase by Pugh the bankrupt.

The Court of Appeals for the Ninth Circuit, without discussion of the errors alleged, affirmed March 10, 1955 (not yet reported) (App. B. p. 10a).

Earhart petitioned for re-hearing April 8, 1955 calling attention to the rule in Washington state on the question of bailment. This petition was denied April 14, 1955 without opinion.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is of public importance in the orderly administration of the Bankruptcy Act as it affects third persons and is in direct conflict with the decisions of this court in *Dows v. National Exchange Bank*, 91 U.S. 312, 328;[1] *Sturm v. Boker*, 150 U.S. 312 (328);[2] *Thomas v. Taggart*, 209 U.S. 385;[3] and *Ludwig v. American Woollen Co.*, 231 U.S. 522;[4] and the rule in the State of Washington as annunciated by the Washington State Supreme Court in *Dahl v. Stromberg*, 31 Wn. 2nd 884[5] on the subject of bailment.

The decision of the referee, the District Court

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[1]Holding an invoice is not a bill of sale and standing alone, it is never regarded as evidence of title.

[2]Defining bailment with privilege of purchase as distinguished from "sale or return."

[3]Holding that property purchased by an insolvent, subsequently bankrupt, with knowledge he could not pay for it forms no part of the estate in bankruptcy where the sale has been rescinded by the original vendor.

[4]Holding.

[5]On question of bailment.

and the Court of Appeals for the Ninth Circuit on the subject of novation is contrary to the decisions of the Washington State Supreme Court in the case of *MacPherson v. Franco*, 34 Wn. 2d 179.[6]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN EGAN BELCHER
Counsel for Petitioner.

1201 Northern Life Tower
Seattle 1, Washington

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[6]Holding that under facts similar to the instant case there was not a novation.

APPENDIX

APPENDIX A

GENERAL ORDER AND STATUTES INVOLVED

Section 53, Title 11 U.S.C., sets out Order XXVII relating to review of orders of referees in bankruptcy and reads:

> "When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto and the finding and order of the referee thereon."

Title 11, U.S. Code—*Bankruptcy referees.*

Sec. 66. *Jurisdiction.* Referees respectively are invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this title conferred on courts of bank-

ruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; * * *." (July 1, 1898, c. 541, Sec. 38.30 Stat. 555).

Sec. 67. Referees. *Duties.* (a) * * * (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; * * *; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; * * * (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance. * * * (July 1, 1898, c. 541, Sec. 39, 30 Stat. 555).

APPENDIX B

ORDER ON ORDER TO SHOW CAUSE BY REFEREE

This matter having come on duly and regularly before the undersigned Referee in Bankruptcy on order to show cause directed to W. J. Earhart, the said W. J. Earhart appearing in person and represented by counsel, Kenneth I. Ghormley and Nelson R. Anderson, and Alfred J. Callan appearing by his attorney, Joseph A. Barreca, and the said W. J. Earhart and Felix Ivan Pugh, the Bankrupt, being both first duly sworn, on oath, gave testimony; and certain exhibits having been introduced into evidence by both the trustee and respondent, and the matter being fully heard before the Referee in Bankruptcy in the above entitled matter now therefore, the said Referee and undersigned make the following findings of fact:

FINDINGS OF FACT

1. That on October 14, 1953, Felix Ivan Pugh, the bankrupt in the above entitled matter, was in possession of 54 tons of hay within the hay barn at 611 West Taylor Road, Kent, Washington, a farm operated by the bankrupt.

2. That the bankrupt, Felix Ivan Pugh purchased the said hay from Harry C. Walters, Sunny-

side, Washington, on or about the first week of September, 1953.

3. Felix Ivan Pugh paid for said hay by tendering his check in the sum of $1,200.00 to the said Harry C. Walters, and that it was the intent of both parties that title to said hay pass to Felix Ivan Pugh, and the first load of said hay was delivered to Felix Ivan Pugh prior to September 7, 1953 by L. R. Strothers Company at the request of Felix Ivan Pugh.

4. That prior to the purchase of the hay by Felix Ivan Pugh both Mr. W. J. Earhart and Felix Ivan Pugh agreed that Mr. Earhart would finance the transaction . Mr. Pugh bought the hay in good faith, tendering his check therefor, and believing that Mr. Earhart would loan Felix Ivan Pugh sufficient funds to cover said check as had been done in the past.

5. That after Mr. Pugh purchased the hay and tendered his check therefor, to Mr. Harry C. Walters, in a conversation with Mr. Earhart, Mr. Earhart disapproved the purchase and told Mr. Pugh that he shouldn't have bought that hay, and that this year he wanted to finance the hay on a different basis.

6. That thereafter Mr. Earhart contacted both Harry C. Walters, the payee on Mr. Pugh's check and the bank upon which Mr. Pugh drew his check, stating that he, Mr. Earhart, would pay for the hay.

7. That at no time did Mr. Pugh receive notice that his check to Mr. Walters had been returned to Mr. Walters. That Mr. Walters accepted Mr. Earhart's check in payment for Mr. Pugh's debt on the hay.

8. That the delivery of the hay to Mr. Pugh was completed on or before September 30, 1953.

9. And that the bankrupt was in full possession of said hay at all times after delivery. That thereafter Shaffer Brothers of First and Smith Streets, Box 191, Kent, Washington, between the dates of September 30 and October 14, 1953 extended credit to the said bankrupt in a substantial amount.

10. That at no time did Mr. Earhart receive a bill of sale for said hay and that no security instrument describing said hay was ever filed with the Auditor of King County, Washington to show Mr. Earhart as mortgagee or any other type of security holder:

And from the foregoing findings of fact and the records and files and exhibits herein the undersigned referee makes the following conclusions of law:

CONCLUSION OF LAW

1. That the bankrupt, Felix Ivan Pugh, on and before October 14, 1953 had full title and full pos-

session of 54 tons of alfalfa hay, baled and located in the hay barn on a farm leased and operated by Felix Ivan Pugh, the bankrupt.

2. That the oral agreement between Harry C. Walters, Felix Ivan Pugh, and W. J. Earhart as to payment of the debt due on the unpaid check written by Mr. Pugh constituted a novation, wherein title to said hay was to vest in W. J. Earhart; full possession of said hay was to remain with Felix Ivan Pugh, and Felix Ivan Pugh was to pay W. J. Earhart on an installment basis the full amount advanced by Mr. W. J. Earhart to the original vendor, Mr. Harry J. Walters.

3. That the arrangement between Mr. W. J. Earhart and Felix Ivan Pugh constituted an oral security transaction, and said security transaction was not filed or recorded with the Auditor of King County, Washington.

4. That on the date of adjudication the Trustee in Bankruptcy was vested with all rights of the bankrupt in and to said hay, and was entitled to have the lien of W. J. Earhart, if any he had in and to said hay, preserved for the benefit of the creditors of the above entitled estate; now therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that any lien of W. J. Earhart in and to the 54 tons of hay

in the possession of the bankrupt on the date of adjudication is null and void as to Alfred J. Callan, Trustee in Bankruptcy in the above entitled matter. That the said Trustee is vested with the power to convey the full and complete title to said hay, free of all liens and encumbrances; and it is hereby

ORDERED that Trustee sell said hay located on the premises at 611 West Taylor Road, Kent, Washington, at public sale pursuant to authorization of sale given and held at special meeting of creditors called for said purpose; and that the proceeds of the sale of said hay shall be used for costs of administration, payment of priority claims, and payments pro-rata to general unsecured claims whose claims are allowed herein.

Done in open court this 4th day of January, 1954.

VAN C. GRIFFIN
Referee in Bankruptcy.

APPENDIX B

DISTRICT COURT'S ORDER AFFIRMING REFEREE'S DECISION ON REVIEW

This matter having come on duly and regularly before the undersigned Judge of the above-entitled Court upon Petition for a review of Referee's Order vesting Trustee with 54 tons of alfalfa hay, the Petitioner, W. J. Earhart and counsel for Petitioner, Harold J. Shea, and counsel for the Trustee in Bankruptcy, Joseph A. Barreca, all being present on the 8th day of March, 1954 at the hour of 11:00 a.m., the said matter having been continued from the motion calendar of March 1, 1954, to afford counsel for Petitioner and counsel for Trustee in Bankruptcy opportunity to submit memorandum of issues, points and authorities, and said memorandum and answer thereto being before the Court and considered, and respective counsel having presented their arguments and the Court being fully advised in the premises and it appearing to the Court that the findings of fact are supported by the full record and Transcript of Proceedings and Testimony, and that the conclusions of law are not shown to be in any way erroneous, now therefore it is hereby

Ordered, Adjudged, and Decreed that the Order heretofore entered by the Honorable Van C. Griffin, Referee in Bankruptcy, on the 4th day of January,

1954, is in all respects ratified, approved and confirmed and the Order of the Referee is particularly affirmed as to: (a) ordering 54 tons of alfalfa hay to be administered as an asset of the Bankrupt estate, (b) ordering the Trustee to take possession of said hay, (c) ordering that said hay be sold by the Trustee, free and clear of all liens and encumbrances, (d) ordering that Petitioners have no right, title, or interest in said hay and, (e) in making and entering the Order of January 4, 1954, and it is

Further Ordered that the above-entitled cause be returned to the Referee in Bankruptcy for further proceedings in the administration of the above-entitled estate.

Done in Open Court this 22nd day of March, 1954.
Presented by:

/s/ WILLIAM J. LINDBERG,
United States Judge.

/s/ JOSEPH A. BARRECA,
Attorney for Trustee.

Receipt of copy acknowledged.
(Endorsed): Filed and entered March 22, 1954.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

W. J. EARHART,
Appellant,

vs.

ALFRED J. CALLAN, JR., Trustee in Bankruptcy of the Estate of Felix Ivan Pugh, Bankrupt,
Appellee.

No. 14,365
Mar. 10, 1955

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

Before: HEALY and POPE, Circuit Judges, and HAMLIN, District Judge.

O. D. HAMLIN, District Judge:

This is an appeal from the order of the United States District Court for the Western District of Washington, Northern Division, which ratified, approved and confirmed the order of the referee in bankruptcy in the Matter of Felix Ivan Pugh, Bankrupt, which order directed the trustee in bankruptcy in said bankruptcy estate to take possession of some 54 tons of alfalfa hay and administer the same as an asset of the bankrupt estate.

On October 14, 1953, Felix Ivan Pugh filed his petition in bankruptcy and upon the same day was adjudged a bankrupt. At said time there was upon the farm occupied by Pugh and in his possession 54 tons of alfalfa hay. W. J. Earhart, the appellant, claimed

to own the hay. Alfred J. Callan, trustee in bankruptcy in the matter of Felix Ivan Pugh, a Bankrupt, petitioned for and obtained from the referee an order to show cause directed to Earhart to show cause why the referee should not make an order that said trustee in bankruptcy have full and complete title to the 54 tons of hay. W. J. Earhart made a return to the order to show cause, claiming full and complete title to the hay, and a hearing was had before the referee, at which Earhart was present and represented by counsel.

The facts developed at the hearing were as follows: Felix Ivan Pugh had operated a farm near Kent, Washington, and he needed alfalfa hay to feed his cattle in the fall and winter of 1953. W. J. Earhart was the agent for and related to the owner of the property. In the year 1952 Earhart financed Pugh for the purchase of hay, and in 1953 Pugh, expecting that Earhart would finance his purchase of hay again, went to Sunnyside, Washington, during the summer of 1953 and bought the hay in question from Mr. Harry C. Walters; the price of the hay was $1200.00, and Pugh testified that at that time he gave Walters a check for $1200.00 and that he received a bill of sale from Walters for the hay. Pugh testified that before he bought the hay, he contacted a man named Strother and hired him to haul the hay to Pugh's farm for $8 a ton.

Shortly thereafter Pugh saw Earhart, told him that he had bought the hay, and asked Earhart for the money to cover the check that Pugh had given Walters. Earhart testified that he told Pugh that he should not have bought the hay, and that he, Earhart, was going to handle it differently. Earhart then wrote to a bank, sending $1200.00 to the bank, and asked that the bank handle the matter of the payment for the hay. The bank, however, declined to do this, and Earhart then wrote to Walters, sending to Walters the sum of $1200.00. In the meantime, Walters had sent Pugh's check to the bank and it had been returned to Walters marked "N.S.F." Walters accepted the check from Earhart and destroyed the check which he had previously received from Pugh. Pugh testified that he gave Earhart the bill of sale that he had received from Walters. The hay was delivered to Pugh's farm in four loads. Pugh or his wife paid the hauling charges for delivering one load, they being later reimbursed for this by Earhart; and Earhart paid for delivery of the other loads.

Pugh testified that he talked to Earhart in July of 1953 and they then discussed the matter of the hay for the '53-'54 season. Pugh testified "The way I interpreted it, anyway, the deal would be like the year before, — that he would finance me on the hay." Question: "Didn't he say there would have to be a different

way the hay was financed?" Answer: "The year before, the hay was just on a note, and he wanted $200 a month when I started feeding the hay, and the year before we figured at $100 a month—when I started to feed the hay, I was to pay him $200 a month until the money was paid out plus interest." After the hay was received by Pugh, it was at all times kept in the barn upon Pugh's property and at the time of the bankruptcy had not yet been used.

A couple of days after Pugh filed his schedules in bankruptcy Earhart, having learned of this, went to see Pugh; and at Earhart's insistence, Pugh signed a statement which read: "I wish it to be known that the 54 tons of alfalfa hay * * * was bought and paid for by W. J. Earhart, is fully his property and I have no claim against it." Pugh testified that Earhart told him at that time that he (Earhart) would not leave until Pugh signed this statement and that Earhart shook his finger at him and said, "Either sign this, or * * *" Pugh further testified that when he signed the statement, he "didn't care who had title to it", and when asked at the hearing if he then cared very much, he answered, "No, that is very true." And when asked, "And you felt no harm could be done, is that the reason you signed it?" Pugh answered, "Yes, sir." Pugh further testified before the referee that when he bought

the hay he intended it to be his hay, and that he thought Earhart was financing him.

On the contrary, Earhart testified that when Pugh told him that he, Pugh, had bought the hay, that Earhart said to him, "You should not have bought the hay. I am going to handle it differently. I am buying that hay." Earhart further testified that he then wrote to the bank, stating—

> "I told Ivan Pugh that I would see he could lay in his alfalfa hay for the winter, and consequently when he was over at Sunnyside he bought 60 tons of hay at $20, trucking extra. He wrote a check for $1200, thinking I would cover it as soon as he got here.
>
> I do not intend to handle it that way. I will buy the hay and store it at the farm, and will sell it to Ivan as he uses it by the month.
>
> Here is my check for $1200. Will you please handle it so that I will be the owner of the hay and I will pay you for the trouble you are put to."

The bank returned the check of $1200 to Earhart, stating:

> "We suggest that you make direct payment to the people from whom you purchased the alfalfa hay and get a bill of sale.
>
> We have no way of protecting your interest in this matter."

Thereafter, Earhart sent the $1200 direct to Walters as indicated above.

At no time did Earhart receive from Walters a bill of sale for the hay.

The bankrupt did not list the hay as an asset in his bankruptcy schedule, but did list his schedules as a debt the amount that Earhart had paid to Walters for the hay and the amount that Earhart had expended for hauling costs.

The referee in bankruptcy made the following findings of fact, among others: (1) That the bankrupt purchased the hay from Walters and paid for it by tendering a check for $1200 to Walters; (2) That it was the intent of both parties that title should pass to Pugh; (3) That prior to said purchase Earhart and Pugh both agreed that Earhart would finance the transaction; (4) That later Earhart disapproved of the transaction and sent his check to Walters; and (5) That Walters accepted Earhart's check in payment for Pugh's debt on the hay.

The referee made the following conclusions of law: (1) That at the time of the filing of the petition in bankruptcy Pugh had full title and full possession of the hay; (2) That the oral agreement between Walters, Pugh, and Earhart as to the payment of the debt due on the unpaid check by Pugh constituted a novation, and that Pugh was to pay Earhart on an installment basis the full amount advanced by Earhart to

Walters; (3) That the arrangement between Earhart and Pugh constituted an oral security transaction, and said security transaction was not filed or recorded with the auditor of King County, Washington, as required by law; and (4) That the trustee was vested with all rights of the bankrupt in and to said hay, and ordered further that any lien of Earhart in and to the hay was null and void as to the trustee in bankruptcy.

The District Court in affirming the order of the referee, after hearing both sides on the petition for review of the referee's order, made an order in which the following appeared:

> "It appearing to the Court that the findings of fact are supported by the full record and transcript of proceedings and testimony, and that the conclusions of law are not shown to be in any way erroneous, now therefore it is ordered * * * that the order heretofore entered by the * * * Referee in Bankruptcy is in all respects ratified, approved, and confirmed * * *."

and ordered:

> "* * * that petitioners have no right, title or interest in said hay * * *."

Earhart contended in the District Court and in this Court, First, that he was the owner of the hay in question and that Pugh had no interest therein; and Second, that the evidence as a whole shows a bailment of the hay and that Earhart orally agreed with the

bankrupt that he would sell the hay to him on a monthly basis.

The record shows that conflicting evidence was presented to the referee on the question of Pugh's interest in the hay. There is substantial evidence to support the finding of the referee that Pugh purchased the hay from Walters with the intent to take title to the hay.

A bailment is generally regarded as the relationship arising when personal property is delivered to another for some particular purpose upon an express or implied contract to re-deliver the goods when the purpose had been fulfilled or to otherwise deal with the goods according to the bailor's directions. 8 C.J.S. 222, 229; Collier on Bankruptcy, 14th ed. by Moore and Oglebay, §60.44, p. 948, §70.18, p. 1045. It is an indelible incident to a bailment that the bailor may require restoration of the thing bailed. Here, even under Earhart's theory, Pugh had the right to feed the hay to his cattle and to pay Earhart therefor upon a monthly basis.

On the other hand, the distinguishing feature of a conditional sale is an obligation to buy and to pay the agreed price. Collier on Bankruptcy, supra, §60.44, §70.19, §70.57. *Kemp-Booth Co. v. Calvin*, 1936, 9 Cir., 84 F. 2d 377. The Washington decisions adhere

to this distinction when called upon to classify the transaction either as a conditional sale or as something else. *Eisenberg v. Nichols*, 22 Wash. 70, 60 P. 124; *Eilers Music House v. Fairbanks*, 80 Wash. 379, 141 P. 885; *Inland Finance Co. v. Inland Motor Car Co.*, 125 Wash. 301, 216 P. 14; *Ivy v. Commercial Credit Co.*, 173 Wash. 360, 23 P. 2d 19; *In re Renfro-Wadenstein*, D.C. Wash., 47 F. 2d 238, modified, 9 Cir., 53 F. 2d 834; and see 175 A.L.R. 1366, 1382.

However, a finding of a conditional sale or a chattel mortgage can not help appellant. It is an undisputed fact that no instrument pertaining to the transaction in question was recorded, as is required by Washington statutes for the protection of the creditor's lien.[1] Nor is it disputed that if the transaction be a conditional sale, or a chattel mortgage, the interest of the vendor or creditor, is void as to subsequent creditors, and hence as to the trustee in bankruptcy, Collier on Bankruptcy, supra, §70.49, §70.57.

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[1] "*Conditional sales* of personal property, or leases thereof containing a conditional right to purchase, when the property is placed in the possession of the vendee *shall be absolute as to all bona fide* purchasers, pledgees, mortgagees, encumbrancers, and *subsequent creditors*, whether or not such creditors have or claim a lien upon the property, *unless within ten days after the taking possession by the vendee, a memorandum of the sale*, stating its terms and conditions including the rate of interest and the purchase price exclusive of interest, insurance, and all other charges and signed by the vendor and vendee, *is filed in the auditor's office of the County, wherein* at the date of the vendee's tak-

The testimony before the referee produced substantial evidence to support a finding that Pugh had obligated himself to pay for the hay. Certainly there was no evidence to support a finding that Pugh took the hay upon any kind of a contract to deal with it according to Earhart's directions or to redeliver it to him. Rather, the evidence showed that Pugh was to have sole control over the disposition of the hay, and promised to pay $200 a month on the purchase price.

The scope of review which the District Court and this court affords to orders of a referee in bankruptcy is governed by the General Orders in Bankruptcy. Orders 47, 36, 37, 11 U.S.C. following §53. These Orders, as implemented by Rules 52(a) and 53(e) of the Federal Rules of Civil Procedure, require the District Court to accept the referee's findings unless clearly erroneous. *Humphrey v. Hart*, 1946, 9 Cir., 157 F. 2d 844; *In re Skrentny*, 1952, 7 Cir., 199 F. 2d 488, 492. Similarly, this court may not set aside the

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ing possession of the property, *the vendee resides* * * *." (Rev. Code Wash. 63.12.010; emphasis supplied.)

"*A chattel mortgage is void as against all* existing and subsequent *creditors* of the mortgagor whether or not they have or claim a lien upon the property, and against all subsequent purchasers, pledgees, and mortgagees and encumbrancers for value and in good faith, *unless it is accompanied by the affidavit of the mortgagor* that it is made in good faith and without design to hinder, delay, or defraud creditors, *and unless is is acknowledged and filed, within ten days* of the time of its execution, *in the office of the auditor* of the county in which the mortgaged property is situated * * *." (Rev. Code Wash. 61.04.020; emphasis supplied.)

findings of the referee unless they are clearly erroneous. *Diamond Laundry Corp. v. Calif. Empl. Stab. Com.*, 1947, 9 Cir., 162 F. 2d 389, 401; *Smith v. Federal Land Bank of Berkeley*. 1945, 9 Cir., 150 F. 2d 318, cert. den. 326 U.S. 764; *Link v. Boeshans*, 1945, 8 Cir., 151 F. 2d 322.

The findings of the referee here are not clearly erroneous and must be sustained. These findings and the evidence as a whole cannot serve as the basis for a holding that the transaction was a bailment. They amply support the conclusion that Earhart's interest in the hay was, at most, a lien pursuant to a conditional sale or a chattel mortgage. It follows that the order below must be upheld.

Appellant makes some contention that even where the District Court hears an appeal from an order of a referee, he is required by Rule 52(a) of the Federal Rules of Civil Procedure to make independent findings of fact, without reference to those of the referee. While some findings must be found by the District Court, this court has said in reviewing a District Court's approval of the report of a referee in bankruptcy:

> "The record on appeal showed that the court below had not found the facts, as of course it should have done, *either by adopting the master's findings or by making findings of its own.*" *Humphrey v. Hart*, supra, pp. 845-846; (emphasis supplied).

The applicable rules and decisions clearly do not require the District Court to enter its own findings of fact if the findings of the refereee are adopted or approved by the lower court. Therefore, appellant's contention in this regard is without merit.

Appellant has questioned the jurisdiction of the referee in bankruptcy to adjudicate the conflicting claims of the trustee and the appellant as to the ownership of this hay in a summary proceeding. It is well settled that the referee has such jurisdiction where the subject of the controversy is in the possession of the bankrupt at the time when the petition in bankruptcy is filed. *Magnolia Petroleum Co. v. Thompson*, 309 U.S. 478; *Harris v. Avery Brundage Co.*, 305 U.S. 160; *Heath v. Helmick*, 9 Cir., 1949, 173 F. 2d 157; and see *England v. Nyhan, 1944*, 9 Cir., 141 F. 2d 311.

We find no reason to disturb the order of the referee as approved by the court below, and the order of the District Court is hereby affirmed.

(Endorsed:) Opinion. Filed Mar. 10, 1955.

Paul P. O'Brien, Clerk

No. 14365

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

W. J. EARHART,

Appellant,

vs.

ALFRED J. CALLAN, JR., Trustee in Bankruptcy of the Estate of Felix Ivan Pugh, Bankrupt,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR RE-HEARING

Appellant respectfully petitions this honorable court for a reconsideration of its decision filed on March 10, 1955 on the subject of *bailment* because we believe that the conclusion arrived at by this honorable court is at variance with the statutory law of the State of Washington and the subject of bailment as annunciated by the decisions of the Supreme Court of the State of Washington.

More than twenty years ago the Washington State Legislature adopted the Uniform Sales Act (Rem. Rev. Stat. Sec. 5836, et seq., now R.C.W. 63.04 et seq.).

In the state court receivership proceedings in the case of *Dahl v. Stromberg*, 31 Wn. 2d 884 it appears

that one Bennett was the owner of certain real property consisting of a garage immediately in front of his home in Falls City, Washington which he orally leased to a man named Stromberg. Bennett agreed to sell and Stromberg agreed to buy the stock of tools and equipment then on the premises for $1750.

Later on a man named Dahl entered into a business association with Stromberg. The association proved unsatisfactory and Dahl brought receivership proceedings and one Charles Evans was appointed receiver. Bennett intervened in the receivership and claimed the tools and equipment as his own.

The trial court was called upon to decide the issue of the right to possession as between Bennett and the receiver under state law. The trial court decided that Bennett was a bailor and Stromberg a bailee and as against the receiver that Bennett was the owner and entitled to possession as against the receiver. In affirming the judgment of the trial court, the Supreme Court of the State of Washington said (p. 886):

> "We agree with the trial court that Bennett and Stromberg could and did abandon their conditional sales agreement.
>
> That was accomplished before Dahl had any dealings with Stromberg. Had there been a redelivery of possession by Stromberg to Bennett at

the time of the abandonment of the conditional sales contract and then a return of the tools and equipment by Bennett to Stromberg for his use in the operation of the garage, there could be no question that Stromberg was the bailee thereof and would have no interest therein which he could transfer to Dahl.

Appellant contends that because Stromberg retained the physical possession which he had originally assumed under the conditional sales contract, Rem. Rev. Stat. (Sup.) §3790 applies. With this we cannot agree. The fact that there was no physical transfer of possession by Stromberg to Bennett and by Bennett to Stromberg can avail the appellant nothing. The fact still is that Stromberg was in possession of Bennett's property *as bailee*, and Dahl was not deceived by the abandonment conditional sales contract, because he knew nothing about it.

Rem. Rev. Stat. (Sup.) §3790, the statute relied on reads, 'That all conditional sales * * * shall be absolute as to all subsequent *bona fide* purchasers * * *'

It is not the right to possession that becomes absolute when the conditional sales contract is not filed for record; it is the conditional sale that becomes absolute. In the present case there was no conditional sale that could become absolute when Stromberg purported to sell to Dahl an interest in the tools and equipment, because that conditional sale had been abandoned more than three months earlier.

Appellant next urges that the bill of sale used to evidence the abandonment of the conditional sales contract made Stromberg the seller and brings this case within the Sales Act, Rem. Rev. Stat. §5836-25 (P.P.C. §859-17) which reads as follows: (here the statute is set out)

> The section of the statute relied upon applies 'where a person having sold goods continues in possession of the goods * * *' Stromberg was not a person 'having sold goods' because he had no goods to sell. He never had more than a fifty dollar interest in goods worth, presumably seventeen hundred fifty dollars, under a conditional sales contract, the abandonment of which was evidenced by the bill of sale. Such a bill of sale cannot create a title or interest which the seller does not have. The document in question adds nothing to or subtracts nothing from the rights acquired by Dahl when Stromberg purported to sell him an interest in the tools and equipment."

In the case at bar, the evidence clearly shows that the minds of the parties (the bankrupt and Earhart) never met on any part of an agreement other than that the hay would be and was stored in the barn on the property leased by Earhart to the bankrupt. It was, however, agreed that *when the feeding season commenced* — which was anticipated would be in October 1953 — that *Pugh might consummate a purchase, by paying Earhart by the month.*

The feeding season had not yet arrived when the bankrupt filed his petition, and before a trustee was appointed the bankrupt in writing stated Earhart owned the hay.

While the bankrupt testified that the contemplated purchase was to be at the rate of $200 a month, *as he recalled* Earhart *was positive in his testimony*

as shown by the record, pp. 39, that no sale had been consummated.

Q. When did you first have a conversation with Mr. Pugh about the 1953-1954 hay — the hay he needed for 1953-1954 to throw into the cattle?

A. I think it was prior to July 10, 1953.

Q. What was that first conversation with Mr. Pugh?

A. Pugh had refinanced through the Farmers' Credit Association, refinanced, and he had paid up various debts. He paid me off what he owed on the cattle, and he paid the Washington Co-operative Farmers' Association — he owed them $500 — and he paid that off, and I think there were a few other small debts he paid off but *he still owed me*, and he owed me something for rent, and the bank had refused to take his checks any more for the rent. They told me they couldn't handle it any more, because they were NSF checks, and so he wanted me to — and we handled it by making a note for the back rent *and hay — he hadn't paid for all of the previous year's hay and we put it in a note amounting to $714.00* and then he wanted me to finance him for this hay, and I (R. 40) said "Yes, Ivan, I will, but *it will be put on a different basis.*"

Q. That was for this hay we are talking about here?

A. Yes sir I said, "We will do it on a different basis." I said "I will buy it and pay for it, and I will sell it to you on a thirty-day basis."

Q. As he used it? A. Yes.

And at p. 44, regarding his payment for the hay:

Q. Did you make it clear in that letter or order to Mr. Walters that your purchase was a *new transaction*, separate from the bankrupt's original order for 60 tons of hay?

A. Yes, sir. I told him I was buying the hay, yes.

Q. Did you have an specific agreement with Mr. Pugh as to how he was to pay for this hay on a monthly basis?

A. Not yet.

Q. That was held in abeyance *until he began to feed it?*

A. Yes, he didn't feed until October, and this came up in the meantime.

Q. And you had an understanding with him you would reach an agreement later on that point, whether he would take his milk checks and turn them over to you?

A. Yes, sir. I always thought we would figure up so many bales a month, you know. That was the way we would do it.

It has been held by the 8th Circuit in the case of *Gillespi v. Piles & Co.*, 178 F. 886 that property which was purchased by an insolvent, subsequently bankrupt, *with knowledge that he could not pay for it forms no part of the estate in bankruptcy* where the sale has been rescinded by the original vendors and demand made for the proceeds. The proceeds of the property may therefore be recovered by the vendor from the purchaser's trustee in bankruptcy.

See also *Thomas v. Taggart*, 209 U.S. 385.
In 6 Am. Jur. Bailments, Sec. 36, p. 163, we find:

"It is a common practice to leave personal property with another as bailee, who is to have the right of purchasing it if he pleases. *Such a transaction is a bailment with the privilege or option of purchase*, although it is often confounded with a sale, either conditional or under a contract of 'sale and return'."

Strom v. Baker, 150 U.S. 312.

In support of this rule it is said of this rule that such a transaction includes two distinct but consistent contracts, the one taking effect, if at all, when the other is spent. The bailment is operative to fulfill its proper function, and it is subverted by the happening of the event which brings about a sale; both are consistent and may stand together as part of the same contract relation."

Hamilton v. Billington, 163 Pa. 76 29 A. 904, 43 Am. St. Rep. 780.

In the opinion filed herein (page 2) it is said:

"In the year 1952 Earhart financed Pugh, and in 1953 Pugh, *expecting that Earhart would finance his purchase of hay again*, went to Sunnyside, Washington, during the summer of 1953 and *bought the hay in question* from Mr. W. C. Walters; the price of the hay was $1200.00 and *Pugh testified* that at the time he gave Walters a check for $1200.00 and that *he received a bill of sale from Walters for the hay.*"

Granted that he so testified — he also testified that his check for $1200.00 dated in July or August 1953 was returned by Pugh's bank marked NSF

(R. 28) and that he knew he did not have on deposit funds sufficient to have the check honored.

The so-called bill of sale was never produced and there is no evidence that it was ever recorded as required by the laws of the State of Washington.[1]

The testimony of Pugh is entitled to little or no credence for the following reasons:

1. He lied when he said he paid for the hauling of the hay. (R. 30).
2. He lied when he said that Walters gave him a bill of sale to the hay (R. 23). All he got was a recipt for his check (R. 28).
3. He lied when he first said Earhart came to his house to have him sign Ex. 1 dated October 16, 1953; and *wouldn't leave until that was signed* (R. 33). Because he signed it a day or two later after he and Earhart went to his lawyer's office. (R. 36).

BAILMENT

3 R.C.L.—(Bailments) §7, p. 77.

"*Privilege of purchase and bailment for sale*—It is common practice to leave personal property with another as bailee, who is to have the right of purchasing it if he pleases. Such a transaction is a bailment with the privilege or option of purchase, and is often confounded with a conditional sale. Where from the contract it appears that the party who receives possession of

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[1]§5291 Rem. Rev. Stat.

goods receives them under an agreement that he is to retain them for a definite period, and that if at or before the expiration of that period, he pays for them, he is to become the owner, otherwise to pay for their use, the transaction is but a bailment, and title to the property, even against creditors, remains in the bailor until the price is paid."

Dunlap v. Gleason, 16 Mich. 158, 93 Am. Dec. 231;

Brown v. Billington, 163 Pa. St. 76, 29 Atl. 904, 43 A.S.R. 780;

Lippincott v. Scott, 198 Pa. St. 283, 47 Atl. 1115, 82 A.S.R. 801 and note.

In bankruptcy the construction and validity of a contract must be determined by local laws of the State.

Bryant v. Swafford, 214 U.S. 279.

"An express contract is not necessary to constitute a bailment, many well recognized cases of bailment being founded on an implied contract."

6—C. J. Bailments §30 p. 1105.

"An oral bailment is as valid as one that is written, and is entitled to the same consideration."

6—C. J. 1 Sec. 29, p. 116 Bailments.

"A stipulation for a return of the property bailed *is unnecessary to constitute a bailment*, at least if the bailor has a right to re-take the goods.

6—C. J. Bailment §3 p. 1086.

Walton v. Tepel, 210 Fed. 261;
In re Angeny, 151 Fed. 959.

That Pugh did not consider that he owned this 54 tons of hay when he filed his petition in bankruptcy is further evidenced by the fact that *he did not list it in his schedule of assets.*

In his schedule of debts he lists as being due Earhart $850 — (undisputed) on promissory note $350 for taxes, 1952-53, and on open account for hay (1953) $1540.

Pugh was adjudicated bankrupt October 14, 1954 (R. 21) just two weeks after the last load of hay was delivered. (R. 52).

October 16, 1953, which was long before a trustee was appointed (November 17, 1953) he signed a statement that Earhart owned the 54 tons of hay (Ex. 1), and later a similar statement to Farmer's Home Loan Association (Ex. 2 R. 64).

The trustee made no inventory of the assets of the bankrupt estate as required by the Bankruptcy Act.

There were absolutely no assets in the bankrupt estate and this summary proceeding was commenced for the sole purpose of securing funds to pay the trustee, his attorney and the attorney for the bankrupt, and actually deprived Earhart of his property without

legal or equitable justification.

The court in its opinion says: (p. 2) that Pugh "bought the hay in question from Mr. Harry C. Walters; the price of the hay was $1200.00 and Pugh testified that at that time he gave Walters a check for $1200 and *received a bill of sale from Walters for the hay*," and further "Pugh testified *he gave to Earhart* the bill of sale he had received *from Walters*."

The record we believe clearly shows that all Pugh received from Walters was a receipt for his check (R. 28). He did positively testify however that:

"The check was returned NSF * * *" (R. 28).

> "Property which was purchased by an insolvent, subsequently bankrupt, with knowledge that he could not pay for it forms no part of the estate in bankruptcy where the sale has been rescinded by the original vendors and demand made for the proceeds. The proceeds of the property may therefore be recovered by the vendor from the purchaser's trustees in bankruptcy."
>
> *Gillespi v. J. C. Piles & Co.* (C.C.A. 8) 178 F. 886;
>
> *Thompson v. Taggart*, 209 U.S. 385.

At p. 7 of our brief we pointed out that in February 1954 one Tibeau entered into a stipulation with the trustee and Earhart, by the terms of which Tibeau purchased this hay for $30 a ton and agreed to pay the trustee therefor as used by him and as between

the trustee and Earhart it was agreed that all sums received by the trustee from Tibeau would be kept in a separate account to await the outcome and final determination as to the title of this hay.

The trustee in bankruptcy stands in no better position than the bankrupt.

It is therefore respectfully requested that further consideration be given the matter by this honorable court.

Respectfully submitted,

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Attorneys for Appellant

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Seattle 1, Washington

CERTIFICATE

I hereby certify that in my professional judgment this petition for reconsideration or re-hearing is well founded and it is not interposed for delay but solely in an attempt to prevent a miscarriage of justice.

Dated this 5th day of April 1955.

HAROLD J. SHEA
Attorney for Appellant